Supreme Court, U.S.
FILED

(2)

93 2021 JUN 13 1994

OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ALABAMA,

PETITIONER - APPELLEE,

V.

CHARLES HANSBROUGH,

RESPONDENT - APPELLANT.

APPENDICES TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JAMES H. EVANS
ALABAMA ATTORNEY GENERAL

*JAMES B. PRUDE
ASSISTANT ALABAMA ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 252-7300

*ATTORNEY OF RECORD

39 pp

TABLE OF CONTENTS

	PAGE
APPENDIX "A".....	1
APPENDIX "B".....	16
APPENDIX "C".....	36
APPENDIX "D".....	37

APPENDIX "A"

HANSBROUGH V. LATTA

Charles HANSBROUGH, Petitioner-Appellant,

v.

Sherrell Wayne LATTA, Jailer, Attorney General of the State of Alabama,

Respondents-Appellees.

No. 91-7735.

United States Court of Appeals,
Eleventh Circuit.

Jan. 7, 1994.

Petitioner sought habeas corpus review after the Alabama Court of Criminal Appeals struck his second notice of appeal without explanation. The United States District Court for the Northern District of Alabama, No. 90-CV-695, Clarence W. Algood, J., dismissed writ of habeas corpus as procedurally barred, and appeal was taken. The Court of Appeals, Dyer, Senior Circuit Judge, held that state court's striking notice of appeal was not based on established state procedural rule, and thus, action seeking federal habeas review could not be dismissed as procedurally barred.

Reversed and remanded.

1. **Habeas Corpus Key 842**

Whether petitioner's actions have created state law procedural bar to federal habeas review is mixed question of law and fact which is reviewed de novo.

2. **Habeas Corpus Key 422**

Even if plain statement of why state court appeal was stricken is lacking, federal court should not address habeas corpus petition unless it "fairly appears" that state court's decision rested primarily on federal law or was interwoven with that law.

3. **Criminal Law Key 1131(1)**

Alabama law does not contain rule that voluntary dismissal of appeal is with prejudice so as to bar subsequent appeal.

4. **Criminal Law Key 1083**

Under Alabama law, there is no requirement that posttrial motions have no tolling effect if a notice of appeal has already been filed when motions are denied.

5. **Habeas Corpus Key 403**

Only firmly established and regularly followed state practice may be interposed by state to prevent subsequent review by federal court of federal constitutional claims.

6. **Habeas Corpus Key 403**

Novel state procedural requirements or those of whose existence defendant could not reasonably be deemed to have been apprised could not prevent review of cases seeking vindication in state courts of federal constitutional rights.

7. **Habeas Corpus Key 403**

Absent anything in Alabama's appellate or criminal rules which could reasonably have apprised defendant that dismissal of his orally noticed appeal and refiling as provided by Rule would or even might be untimely or constitute waiver of right to appeal, action seeking federal habeas review could not be dismissed as procedurally barred; striking of notice of appeal by state court was not grounded on any firmly established procedural rule.

8. Criminal Law Key 1081(4.1)

Fact that defendant filed notice of appeal in Alabama state court prior to filing his postsentencing motions did not affect treatment of premotion notice of appeal as having been filed on date notice is denied. Rules App.Proc., Rule 4(b)(1).

Appeal from the United States District Court for the Northern District of Alabama.

Before KRAVITCH and BLACK, Circuit Judges, and DYER, Senior Circuit Judge.

DYER, Senior Circuit Judge:

Hansbrough's Petition for Writ of Habeas Corpus was dismissed by the district court as procedurally barred. In the state court he attempted to raise federal constitutional issues, for example, that he was denied Brady material and that a search and seizure was illegal.

The issue before us is whether the action of the state court in striking Hansbrough's notice of appeal rests upon an independent and adequate state procedural rule that is firmly established and regularly followed, so as to deprive him of an opportunity for federal review on the merits. We find that he is entitled to such a review, and reverse.

Procedural History

Hansbrough was convicted in an Alabama state court for attempted theft first degree and for possession of forgery devices, and was sentenced to 20 years on each charge to run concurrently. He filed a timely oral notice of appeal on April 20, 1990 as authorized by Ala.R.App.P. 3(a)(2). On May 17, 1990 he filed a motion for a new trial. This motion was denied by the trial court on May 22, 1990, while Hansbrough's direct appeal was pending. He withdrew the oral notice of appeal on June 8, 1990 because he discovered that the trial court had appointed unwanted counsel and he wished to

proceed pro se. Thereafter, on June 15, 1990 the Alabama Court of Criminal Appeals dismissed his oral notice of appeal. On June 28, 1990 Hansbrough filed a written pro se notice of appeal which was within 42 days after denial of his timely-filed motion for new trial as provided by Ala.R.App.P. 4(b)(1)[1] , but more than 42 days of the date of sentencing. In this notice he stated that he wanted to appeal from the court's judgment of conviction on March 2, 1990 and the denial of his motion for a new trial on May 22, 1990. On July 8, 1990, the

---

[1]Rule 4. Appeal As of Right - When Taken

(b) Appeals in Criminal Cases.

(1) Circuit Court. In a criminal case a notice of appeal by the defendant shall be filed with the clerk of the trial court within 42 days (6 weeks) after pronouncement of the sentence, provided that the notice of appeal may be oral, as provided in Rule 3(a)(2) ... If a motion in arrest of judgment, motion for new trial, or motion for judgment of acquittal has been filed within 30 days from pronouncement of the sentence, an appeal may be taken within 42 days (6 weeks) after the denial or overruling of the motion....

Alabama Court of Criminal Appeals "struck" the second notice of appeal without opinion or further explanation. The district court concluded that the state court proceedings constituted a procedural default precluding federal habeas review on the merits.

In the Report of the Magistrate Judge adopted by the district court, it was stated that:

> It is not clear whether the court viewed the second appeal as being barred by the dismissal of the first or as being untimely; either is a possibility. In either event it is apparent that the Alabama Court of Criminal Appeals viewed the written notice of appeal filed June 27, 1990, to be insufficient to invoke its appellate jurisdiction to review the merits of the petitioner's appeal.
>
> The combination of the petitioner's dismissal of his first appeal and the striking of his second appeal constitutes an independent and adequate state ground precluding consideration of the merits of the habeas claims now before the court.

Analysis

Hansbrough's notice of appeal filed after the denial of his motion for new trial would have been deemed timely, absent the earlier oral notice. The state argues that the withdrawal acted as a bar to his subsequent appeal. It further contends that the filing of a motion for a new trial tolls the running of the 42-day limit only if the notice of appeal is given after the motion is filed, but has no tolling effect if the notice of appeal is given prior to the filing of the new trial motion. When Hansbrough withdrew his oral notice of appeal, the state argues that his notice became "vacated ab initio," and the time limit for any subsequent notice of appeal would be calculated from the date of sentencing, which was more than 42 days before he filed his second notice of appeal. Thus the dismissal of the original notice of appeal constituted a procedural default of the claim he raises in his habeas petition under Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

Hansbrough argues that the state action must rest on independent and adequate state procedural grounds. In order to be "independent", the rule may not be intertwined with an interpretation of federal law; the state court must have relied on a state rule sufficient to justify its decision. In order to be "adequate", the rule must not be applied in an arbitrary or unprecedented fashion. He contends that the Alabama Court of Criminal Appeals relied on a novel procedural requirement which he could not have reasonably known about.

[1] Whether a petitioner's actions have created a state law procedural bar is a mixed question of law and fact, which this Court reviews de novo. Tower v. Phillips, 7 F.3d 206, 208 (11th Cir. 19930.

[2] The record does not contain a "plain statement" of why Hansbrough's second notice of appeal was stricken. See Harmon v. Barton, 894 F.2d 1268, 1271 (11th Cir.), cert. denied, 498

U.S. 832, 111 S.Ct. 96, 112 L.Ed.2d 68 (1990). Even if a plain statement is lacking, a federal court should not address the claim unless it "fairly appears" that the state court's decision "rested primarily on federal law or was interwoven with such law". Coleman v. Thompson, 501 U.S. ___, ___, 111 S.Ct. 2546, 2559, 115 L.Ed.2d 640 (1991). It does not "fairly appear", however, that the dismissal was based upon or interwoven with federal law. Thus, federal review of Hansbrough's claim is barred, absent a showing of cause and prejudice, if the state applied its well established and regularly followed procedural rules to dismiss the appeal.

Discussion

[3, 4] There is no Alabama rule or law that a voluntary dismissal of an appeal is with prejudice so as to bar a subsequent appeal. Likewise, there is no Alabama case holding that post-trial motions have no tolling effect if a notice of appeal has already been filed when the motions are denied.

In this case, Hansbrough had made clear in the trial court and on appeal that he intended to proceed pro se. The trial court nonetheless appointed counsel. When Hansbrough became aware of that, he undertook action to correct the situation. The question is not whether Hansbrough was well advised to proceed without counsel, or whether there was some other way to effect removal of this undesired counsel. The question is whether his action transgressed a firmly established and regularly followed state procedural rule.

[5, 6] In Ford v. Georgia, 498 U.S. 411, 423, 111 S.Ct. 850, 587, 112 L.Ed.2d 935 (1991), the Supreme Court followed James v. Kentucky, 466 U.S. 341, 348-51, 104 S.Ct. 1830, 1035-36, 80 L.Ed.2d 346 (1984), in holding "that only a 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim." Novel procedural requirements or those of whose existence the

defendant could not reasonably deemed to have been apprised, cannot be permitted to thwart review of cases seeking vindication in state courts of federal constitutional rights. See NAACP v. Alabama, ex rel. Flowers, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2d 325 (1964); Wright v. Georgia, 373 U.S. 284, 83 S.Ct. 1240, 10 L.Ed.2d 349 (1963); Spencer v. Kemp, 781 F.2d 1458, 1463, 1469-71 (11th Cir. 1986) (en banc).

[7, 8] We find nothing in Alabama's appellate or criminal rules which could reasonably be construed as apprising Hansbrough that dismissal of his orally-noticed appeal and refiling as provided by the Rule would or even might be untimely or constitute a waiver of his right to appeal. The striking of Hansbrough's notice of appeal by the Alabama Court of Criminal Appeals was not grounded on a "firmly established, regularly followed" procedural rule. In fact, Alabama has no rule at all, either providing that withdrawal of one notice of appeal acts as a bar to the second, or

providing that the filing of a second notice of appeal more than 42 days after denial of post-trial motions is untimely if a prior notice has previously been withdrawn. The fact that Hansbrough filed a notice of appeal prior to filing his post-sentencing motions does not appear to be relevant to the issues because under Ala.R.App.P. 4(b)(1), a premotion notice of appeal is treated as having been filed on the date the notice is denied.

Conclusion

We reverse the district court's denial of Hansbrough's habeas petition on the grounds of procedural default and remand for consideration on the merits.

REVERSED and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-7735

CHARLES HANSBROUGH,

Petitioner-Appellant,

versus

SHERRELL WAYNE LATTA, Jailer; ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Respondents-Appellees.

On Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING
(March 14, 1994)

BEFORE: KRAVITCH, BLACK, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing filed by appellees, Sherrell Wayne Latta and Attorney General of the State of Alabama, is denied.

ENTERED FOR THE COURT:

/s/Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CHARLES HANSBROUGH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. CV 90-A-695-S
	)	
CAPTAIN LATTA, Warden;	)	
ATTORNEY GENERAL OF	)	
THE STATE OF ALABAMA,	)	
	)	
Respondents.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

The petitioner, Charles Hansbrough, filed his pro se petition for relief under 28 U.S.C. §2254 in the above-styled cause on April 10, 1990. Although at the time of the filing of this action the petitioner was in custody at the Jefferson County Jail awaiting sentencing, he was sentenced on April 20, 1990, and transferred to the Alabama Department of Corrections thereafter. Petitioner was sentenced to 20 years in prison following his convictions for attempted theft in the first degree and possession of forgery devices after a jury trial. In accordance with the usual practices

of this court and 28 U.S.C. §636(b), the petition has been referred to the undersigned magistrate judge for a preliminary review and recommendation.

I. Procedural Background

On March 2, 1990, petitioner and his wife both went to trial representing themselves. Although an attorney had been appointed to stand-by counsel, petitioner plainly expressed his desire to represent himself. The jury convicted him of attempted theft in the first degree and possession of forgery devices. Petitioner continued to represent himself at the time of sentencing on April 20, 1990, and at the conclusion of the sentencing hearing, he gave oral notice of his intention to appeal the conviction and sentence. From that point forward,the procedural history of this case became complex.

After giving oral notice of appeal on April 20, 1990, as authorized by Rule 3(a)(2) of the Alabama Rules of Appellate Procedure, petitioner

filed three post-conviction motions. Identified as "Motion for New Trial - A," "Motion for New Trial - B," and "Motion for Judgment of Acquittal," all filed on May 17, 1990, only the "Motion for New Trial - B" is pertinent to the issues now asserted in the instant habeas action.[2] Although the "Motion for Judgment of Acquittal" apparently was not ruled upon, both motions for new trial were denied by the trial court on May 22, 1990.

While petitioner's case was pending on direct appeal, he discovered the trial court had

---

[2]Petitioner asserts also that between the time of his conviction and his sentencing, he filed motions with the Alabama Court of Criminal Appeals seeking to stay proceedings in his case and seeking relief in the nature of a writ of habeas corpus. He argues that these motions also presented to that court the same issues now before this Court. The motion to stay proceedings was denied on March 21, 1990, and the state petition for writ of habeas corpus to the Alabama Court of Criminal Appeals was denied on March 28, 1990. Compare Castille v. Peoples, 489 U.S. 346, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989).

appointed his stand-by counsel to represent him on appeal. Not wanting to be represented by counsel and wishing to pursue his appeal pro se, he filed a motion to withdraw his oral notice of appeal on June 8, 1990. Thereafter, on June 15, 1990, the Alabama Court of Criminal Appeals dismissed the appeal "on motion by appellant...." Thirteen days later, on June 28, 1990, petitioner filed his written "Pro Se Notice of Appeal." In that notice, petitioner expressly stated that he had withdrawn his oral notice of appeal because an attorney was erroneously listed as his counsel of record on appeal. Furthermore, petitioner stated that he wanted to appeal from the court's judgment of conviction on March 2, 1990, the denial of his motions for new trial on May 22, 1990, and other motions set out in the notice. On July 18, 1990, however, the Alabama Court of Criminal Appeals entered an order that "said appeal be and stand stricken in this court and in the court below."

On August 27, 1990, once again the petitioner filed a "Pro Se Notice of Appeal" purporting to appeal from the judgment of conviction, the sentencing order, and the denial of his Motion for Judgment of Acquittal. But, once again, on November 2, 1990, the Alabama Court of Criminal Appeals entered an order dismissing the appeal "as untimely filed."

Following the filing of the petition for habeas corpus in this court, an order was entered on May 18, 1990, requiring the respondents to show cause why the relief should not be granted. Their response was filed on June 11, 1990. On October 5, 1990, the court entered an order requiring all parties to expand the record to address the effect of the petitioner's withdrawal of his original notice of appeal in state court. The court noted that such a withdrawal might be deemed to be a deliberate by-pass under Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). Petitioner responded on October 24, 1990, as did the respondents on October 29, 1990. The court

entered yet another order on January 7, 1991, once again requesting the respondents to further expand the record in this cause and directing the petitioner to show cause why the habeas relief should not be denied because of an apparent deliberate by-pass or procedural default. The respondents expanded the record as directed, and the petitioner responded to the show cause order on February 11, 1991.

II. Procedural Default

The interesting issue presented by this case is whether the petitioner's voluntary withdrawal of his oral notice of appeal constituted a procedural default precluding federal habeas review on the merits of the claims asserted in this action. While the voluntary dismissal of an appeal originally raised concerns about deliberate by-pass under Fay v. Noia, subsequent Supreme Court decisions now appear to make clear that the deliberate by-pass standard has yielded to the procedural default test announced in Wainwright v. Sykes,

433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). See Coleman v. Thompson, ___ U.S. ___, 1991 WESTLAW 107399 (Supreme Court No. 89-7662, June 24, 1991). Based on the facts described above, the court concludes that petitioner has procedurally defaulted these claims and that he has failed to show "cause and prejudice" excusing the procedural default.

The doctrine of procedural default rests upon the long-recognized legal theory that a state criminal conviction should not be disturbed because of alleged federal constitutional errors where there is an independent and adequate state ground upon which the validity of the conviction rests. See Coleman v. Thompson, supra. Thus, the rule stated in Coleman is as follows:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider

> the claims will result in fundamental miscarriage of justice.

Coleman v. Thompson, ___ U.S. ___, ___, 1991 WESTLAW 107399, at p. 17. Hence, the threshold questions presented here are whether the petitioner has defaulted his federal claims and, if so, has he done so on the basis of an independent and adequate state procedural rule.

As outlined above, the critical facts reveal that at the time of the petitioner's sentencing on April 20, 1990, he gave oral notice of appeal as authorized by Rule 3(a)(2) of the Alabama Rules of Appellate Procedure.[3]

---

[3] In pertinent part, Alabama Rule 3(a)(2) reads as follows:

> In criminal cases, an appeal permitted by law as a matter of right to an appellate court shall be taken by the filing of a written notice of appeal with the Clerk of the trial court within the time allowed by Rule 4, or by the defendant's giving an oral notice of appeal at the time of sentencing, which oral notice shall be noted of record;....

Thus, immediately as of the time of sentencing, petitioner had an active pending appeal to the Alabama Court of Criminal Appeals. Within 30 days after the date of sentencing, on May 17, 1990, petitioner filed his post-trial motions for new trial and a motion for judgment of acquittal. Only the "Motion for New Trial - B" is pertinent to the instant habeas case because it is in that motion that the issues now before this court were first raised before the state court. On May 22, 1990, both motions for new trial were denied. There is no indication in the court file that the motion for judgment of acquittal was ever affirmatively ruled upon by the state court.

After learning that his stand-by counsel had been appointed to represent him on appeal, petitioner filed a notice to withdraw his oral notice of appeal. That oral notice of withdrawal was filed on June 8, 1990, <u>after</u> the "Motion for New Trial - B" had been denied by the trial court. Apparently on the basis of the notice of withdrawal, the Alabama Court of

Criminal Appeals dismissed the appeal on the petitioner's motion on June 15, 1990. Thus, as of that date, there was no pending appeal nor was there a pending post-trial motion dealing with the issues now before this court.

Alabama Rule of Appellate Procedure 42 is virtually the same as the comparable federal appellate rule. The Alabama rule reads, in part as follows:

> An appeal or other proceeding may be dismissed on motion of the appellant or moving party upon such terms as fixed by the court. A copy of the dismissal of the appeal shall be filed by the Clerk of the appellate court with the Clerk of the court below.

See Alabama Rule of Appellate Procedure 42. The order dismissing the appeal on petitioner's motion, however, did not specify whether the dismissal was with or without prejudice to the petitioner's right to file subsequent appeals.

On June 27, 1990, the petitioner filed his written notice of appeal, purporting to appeal from the court's order of conviction on March 2, 1990, and the denial of post-trial motions on May 22, 1990. Petitioner asserts that this

notice of appeal was timely inasmuch as it came within 42 days after the denial of his post-trial motions. He cites Alabama Appellate Rule 4(b)(1) for the authority that:

> If a motion in arrest of judgment, motion for a new trial, or motion for judgment of acquittal has been filed within 30 days from the pronouncement of sentence, an appeal may be taken within 42 days (6 weeks) after the denial of overruling of the motion.

Hence, petitioner argues that he had the right to file a second notice of appeal within 42 days after the denial of his post-trial motions even if his earlier oral notice of appeal had been withdrawn and that appeal dismissed.

The action of the Alabama Court of Criminal Appeals on June 15, 1990, however, is contrary to that supposition. On that date, the court struck the appeal, apparently on its own motion, although it did not state the reason for its conclusion that the appeal was insufficient. It is not clear whether the court viewed the second appeal as being barred by the dismissal of the first or as being untimely, either is a

possibility.[4] In either event it is apparent

---

[4]Although there appears to be no Alabama authority on the point, several courts have held that the dismissal of an appeal acts as a bar to subsequent appeals. See generally 5 Am. Jur. 2d Appeal & Error §930, p. 358; Annotation, 96 A.L.R.2d 312 (1964); Annotation, 42 A.L.R. Fed. 758 (1979). Under application of this rule, petitioner's dismissal of his first appeal precluded him from filing another, even if timely.

It is also possible that, contrary to petitioner's argument, his second notice of appeal may have been untimely. Once again, there is no Alabama case law on point, but the phrasing of Ala.R.App.P. 4(b)(1) indicates the tolling effect of post-trial motions on the time for filing an appeal in a criminal case may depend on whether notice of appeal was given before or after the filing of the motions. For instance, the fifth sentence of Ala.R.App.P. 4(b)(1) reads:

> When notice of appeal is made or filed before the timely filing of a motion in arrest of judgment, motion for new trial, or motion for judgment of acquittal, ..., the time for filing of the court reporter's transcript and the clerk's record shall be governed by Rule 11(b) and (c) as if the notice of appeal had been filed on the date of the overruling of such motion. [Emphasis added].

While this does not speak directly to the tolling effect on the time for filing an appeal,

(Footnote Continued)

that the Alabama Court of Criminal Appeals viewed the written notice of appeal filed June 278, 1990, to be insufficient to invoke its appellate jurisdiction to review the merits of the petitioner's appeal.

The combination of the petitioner's dismissal of his first appeal and the striking of his second appeal constitute an independent and adequate state ground precluding consideration of the merits of the habeas claims now before the court. Even though the Alabama Court of Criminal Appeals did not state the

---

(Footnote Continued)
it does indicate the intent that notices of appeal filed before the filing of post-trial motions, not 42 days after that date. Thus, post-trial motions have no tolling effect if a notice of appeal already has been filed when the motions are denied. Under the facts of this case, therefore, petitioner's oral notice of appeal, given before the filing of post-trial motions, was deemed "filed" on the date the motions were overruled, May 22, 1990, and the post-trial motions had no tolling effect. When petitioner dismissed his oral notice of appeal, that appeal was lost. The written notice filed June 27, 1990, was untimely because it was more than 42 days after sentencing and it could not benefit from tolling.

reason for striking the written notice of appeal, it is apparent that the reason did not involve any consideration of the habeas claims now before the court. Petitioner defaulted by dismissing his valid, pending appeal, thereby causing his second notice of appeal to be stricken either because it was barred by the earlier dismissal or because it was untimely. Plainly, the Alabama Court of Criminal Appeals refused to consider petitioner's appeal on the merits because the second notice of appeal invoking their appellate jurisdiction was legally inadequate to do so. The petitioner's failure to prosecute his appeal in a timely and proper manner is an independent and adequate state basis for precluding consideration of the merits of the appellate claims in this habeas action.

In order to avoid the procedural default doctrine of Wainwright v. Sykes, supra, the petitioner must show cause for his procedural default and actual prejudice from the alleged constitutional error. See Wainwright v. Sykes,

supra; Coleman v. Thompson, supra. Because the petitioner represented himself in connection with these appeals, he cannot claim constitutionally ineffective assistance of counsel as cause for the procedural default. Moreover, "cause" in the context of procedural default requires "a showing of some external impediment preventing counsel [or petitioner] from constructing or raising the claim." This means that "cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded... efforts to comply with the state's procedural rule." Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397, 408 (1986); see Pitts v. Cook, 923 F.2d 1568 (11th Cir. 1991). Despite notice from the court explaining the necessity of establishing cause and prejudice, petitioner has not shown any such external impediment that caused him to forfeit his direct appeal on these claims. Indeed, it is apparent from the record that the only cause for the loss of the appeal was the

petitioner's own errors. Being not able to show cause for his procedural default, the merits of the petitioner's claims cannot be reviewed by this court.

Finally, application of the procedural default doctrine precluding review of the merits in this case does not result in a fundamental miscarriage of justice. The "miscarriage of justice" test is a narrow exception to the procedural default rule, acting as a "safety valve" for the "'extraordinary case' where a substantial claim of factual innocence is precluded by an inability to show cause." Harris v. Reed, 489 U.S. 255, 271, 109 S.Ct. 1038, 103 L.Ed.2d 308, 323 (1989) (O'Connor concurring). Here, petitioner has made no showing, substantial or otherwise, of factual innocence that would bring him within the "safety valve" of this exception to the procedural default rule.

Having concluded that the petitioner procedurally defaulted the claims now before the court by dismissing an appeal in which they were

included and having determined that he has not shown cause for his failure to properly prosecute the appeal of these claims, this court is precluded from considering the merits of the claims under the procedural default doctrine of Wainwright v. Sykes. Moreover, the "fundamental miscarriage of justice" exception to the rule does not apply. All of that said, no habeas relief is available to the petitioner.

Based upon the foregoing considerations, the magistrate judge RECOMMENDS that the petition for habeas corpus relief pursuant to 28 U.S.C. §2254 in the above-styled cause be DENIED and DISMISSED.

Any party may file specific written objections to this report and recommendation within fifteen (15) days from the date it is filed in the office of the Clerk. Failure to file written objections to the proposed findings and recommendations contained in this report and recommendation within fifteen (15) days from the date it is filed shall bar an aggrieved party from attacking the factual findings on appeal.

The Clerk is DIRECTED to serve a copy of this report and recommendation upon the petitioner and upon counsel for the respondents.

DATED this 25th day of July, 1991.

/s/T. Michael Putnam
T. MICHAEL PUTNAM
UNITED STATES MAGISTRATE
JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CHARLES HANSBROUGH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. CV 90-A-695-S
	)	
CAPTAIN LATTA, Warden;	)	
ATTORNEY GENERAL OF	)	
THE STATE OF ALABAMA,	)	
	)	
Respondents.	)	

O R D E R

The magistrate judge filed his report and recommendation in this cause on July 26, 1991, recommending that the petition for habeas corpus relief under 28 U.S.C. §2254 be denied. The petitioner filed his objections to the report and recommendation on August 9, 1991. Having now carefully reviewed and considered de novo all the materials in the court file, including the report and recommendation and the objections to it, the court is of the opinion that the report and recommendation is due to be and hereby is ACCEPTED and ADOPTED.

Accordingly, the petition for writ of habeas corpus under 28 U.S.C. §2254 in the

above-styled cause is due to be and the same is hereby DENIED and DISMISSED WITH PREJUDICE.

DATED this 12 day of September, 1991.

/s/
SENIOR JUDGE

APPENDIX "C"

RULE 42.

Voluntary dismissal.

If the parties to an appeal or other proceedings shall sign and file with the clerk of the appellate court an agreement that the proceeding be dismissed, specifying the terms as to payment of costs and fees, if any, due in connection with the appeal, the court may order a case dismissed. An appeal or other proceeding may be dismissed on motion of the appellant or moving party upon such terms as fixed by the court. A copy of the dismissal of the appeal shall be filed by the clerk of the appellate court with the clerk of the court below.

APPENDIX "D"

"(b) Appeals in criminal cases.

(1) CIRCUIT COURT. In a criminal case a notice of appeal by the defendant shall be filed with the clerk of the trial court within 42 days (six weeks) after pronouncement of the sentence, provided that the notice of appeal may be oral, as provided in Rule 3(a)(2). A notice of appeal filed after the announcement of a decision or order, but before pronouncement of the sentence, shall be treated as having been filed after pronouncement of the sentence and on the day thereof. If a motion in arrest of judgment, motion for a new trial, or motion for judgment of acquittal has been filed within 30 days from pronouncement of the sentence, an appeal may be taken within 42 days (six weeks) after the denial or overruling of the motion. A motion in arrest of judgment, motion for new trial, or motion for judgment of acquittal filed before pronouncement of the sentence shall be treated as having been filed immediately after

pronouncement of the sentence and on the day thereof. When notice of appeal is made or filed before the timely filing of a motion in arrest of judgment, motion for new trial, or motion for judgment of acquittal, or during the pendency of such a timely filed motion, the time for filing of the court reporter's transcript and the clerk's record shall be governed by Rule 11(b) and (c) as if the notice of appeal has been filed on the date of the overruling of such motion. When an appeal by the state as of right is authorized by statute or rule, the notice of appeal shall be filed in the trial court within 42 days (six weeks) after the decision, order, or judgment appealed from; except that any pretrial appeal by the state shall be taken within the time allowed by the rule of criminal procedure providing for such appeals. See Form 12."

6447I